



Brookfield Rail Segregation Arrangements Final Decision

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Economic Regulation Authority

WESTERN AUSTRALIA

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Executive Summary

1. This Final Decision is an approval of Segregation Arrangements proposed by Brookfield Rail (**BR**) subject to 12 required amendments. The amendments refer in large part to changes in terms used and definitions in the proposed Segregation Arrangements which may be in conflict with the definitions used in the *Railways Access Act 1998 (Act)* or the *Railways (Access) Code 2000 (Code)*.
2. In addition to definitional issues, there are three significant structural requirements included in the required amendments.
3. The first two structural requirements are to remove provisions which exist currently in railway owners' Segregation Arrangements or have existed in other railway owners' Arrangements. Those provisions are (1) a requirement for regular audit and review and (2) a provision defining "access-related functions" as functions involved in arranging railway operations both inside and outside the Code.
4. The third significant structural requirement is the removal of the dispute resolution procedure proposed to be included for the first time by BR.

Requirement for audit and review

5. The Authority approved amendments to The Pilbara Infrastructure's (**TPI**) Segregation Arrangements in 2013 which removed the requirement for regular review and audit of the arrangements. This was partly because the Act and the Code provide sufficient power for the Regulator to require amendments to be made to railway owner's Segregation Arrangements, and to require an audit to be undertaken in relation to any issue at any time.
6. This Final Decision requires that the provisions for regular audit and review are removed from the proposed Segregation Arrangements.

Access-related Functions

7. A definition of "Access-related functions" is provided at section 24 of the Act. "Access-related functions" are only those functions involved in arranging the provision of access to railway infrastructure under the Code.
8. This means that functions involved in arranging commercial contracts to use railway infrastructure outside the Code are not "access-related functions" but "other functions". This Final Decision requires that provisions of the proposed Segregation Arrangements be amended where required to reflect the Act definition of "access-related functions".¹
9. There are a number of follow-on amendments that are necessitated by the requirement to not include arranging out-of-Code contracts as an access-related function.

¹ The issue of the definition of access-related functions was highlighted by the Authority in the Draft Report on the Code Review (September 2015). BR in its submission in response to the Code Review Draft Report indicated its view that the definition of access-related functions the Act was not the intention of Parliament when the Act was promulgated.

10. For example, throughout the document, BR had proposed to use the words “Proponents and Network Participants” to refer to the entities whose interests are protected by the Segregation Arrangements. Brookfield Rail defined a Network Participant to mean an “Access Holder or Operator” and defined “Access Holder” to mean anyone with a commercial agreement. This final decision requires that the words “Proponents and Network Participants” be replaced with “persons seeking access² and operators” throughout.

Dispute resolution

11. The dispute resolution procedure proposed to be included by BR for the first time appears to relate to negotiations occurring otherwise than under the Code. The Code provides for a dispute resolution mechanism to apply to negotiations in Part 3 of the Code. This final decision includes a requirement that Part 8A of the proposed arrangements, which comprises the new dispute resolution mechanism, be removed.

Introduction

12. The sections of the *Railways (Access) Act 1998 (Act)* that are relevant to the establishment of Segregation Arrangements are as follows:
 - Section 28 of the Act requires a railway owner to make arrangements to segregate its access-related functions from its other functions.
 - Section 29 of the Act requires a railway owner, before it puts in place or varies any arrangement for the purpose of carrying out its obligations under section 28, to obtain the Regulator’s approval to the arrangement or variation.
 - Section 42 of the *Railways (Access) Code 2000 (Code)* provides the requirements for public consultation associated with the Regulator approving a railway owner’s Segregation Arrangements.
13. In September 2015, Brookfield Rail (**BR**) submitted Segregation Arrangements for the Authority’s approval. The Authority published BR’s proposed Segregation Arrangements and called for submissions on 18 September 2015.
14. One submission was received, from Co-operative Bulk Handling (**CBH**).
15. The Authority published its Draft decision on 12 November 2015, which approved the proposed Segregation Arrangements subject to 12 amendments. Submissions were invited on the Draft decision by 4 December 2015. Two submissions were received; one each from Aurizon and BR.
16. The Aurizon submission commented that the consultation period for submissions should be extended until after the Australian Competition and Consumer Commission (**ACCC**) has made a decision on what undertakings it will accept in relation to the Brookfield Infrastructure Partners’ proposed takeover of Asciano. Aurizon commented that the proposed Segregation Arrangements are unable to be implemented by the railway owner without the approval of the ACCC.

² “Persons seeking access” includes Proponents who have made a proposal under section 8, and “Entities interested in making a proposal” who have requested information under Section 7 of the Code.

17. The Authority does not agree with this view. The implementation of Regulatory instruments under the WA rail access regime does not require ACCC approval of the form of instrument, or any other ACCC approval. The Authority notes also that the ACCC is making decisions in respect of Brookfield Infrastructure Partners, not Brookfield Rail.
18. Aurizon made further comments, in its submission, related to the definition of confidential information, the acceptability of the audit provisions proposed by BR and the meaning of “access-related functions”. These comments are addressed in the relevant sections of this Final Decision.
19. Aurizon also made comments referring to aspects of the Act which, in its view, may restrict the effectiveness of the Segregation Arrangements. The Authority considers that such comments regarding the adequacy of the Act are not matters relevant to this review. The Authority has therefore not addressed these comments in this decision, and has assessed BR’s proposed Segregation Arrangements in terms of the requirements of the Act as it is written.
20. BR’s submission commented on the meaning of the term “associate” and its preferred term “related operator”. BR commented on the ‘stand-down’ period of two years required in the Draft decision, and also on the meaning of “access-related functions”. These comments are addressed in the relevant sections of this Final Decision.
21. BR included with its submission an amended proposed Segregation Arrangements document for consideration by the Authority. The Authority cannot consider the revised document as a replacement for the document originally provided for consultation. The Authority has instead considered the revised document as an attachment to BR’s submission, and where appropriate has considered the suggested amendments as part of its submission.
22. References to “BR’s proposed Segregation Arrangements” in this document is to the Segregation Arrangements proposed by BR and published by the Authority on 18 September 2015.
23. This final decision document:
 - summarises each part of BR’s proposed Segregation Arrangements, including variations from the current arrangements and any relevant provisions of the Act and the Code;
 - summarises required amendments outlined in the Draft decision, and any comments received in submissions relevant to that part;
 - provides the Authority’s assessment of relevant issues, including those raised in submissions; and
 - sets out the Authority’s required amendments, where appropriate.

Part 1 – Objectives of Segregation Arrangements

24. Part 1 of the proposed Segregation Arrangements provides a summary of the objectives of the Segregation Arrangements in terms of meeting the requirements of

sections 28 and sections 30 to 34 of the Act.³ This part mirrors the purpose and structure of Part 1 of BR's current Segregation Arrangements.

25. The objectives detailed in the proposed Segregation Arrangements align with the requirements as outlined in the relevant sections of the Act, except in relation to section 33 ("Duty of fairness") which is detailed at Part 1(c) of the proposed Segregation Arrangements. In that part, the proposed Segregation Arrangements refer to the duty of fairness in respect only of persons seeking access.
26. The Act, at section 33 requires that:

In performing their functions relevant officers must not have regard to the interests of the railway owner in a way that is unfair to persons seeking access or to other rail operators.
27. Brookfield Rail's current Segregation Arrangements at Part 1(iii) provide for a duty of fairness to be extended to "persons seeking access, proponents or operators". In this respect, the Authority has noted that the terms "proponent" and "operator" are terms defined in the Code, and that "persons seeking access" is not.
28. Persons seeking access is taken by the Authority to include a proponent and an "entity that is interested in making a proposal" as referred to in section 7 of the Code.
29. In its Draft decision, the Authority required an amendment to this part, which was the inclusion of a reference to "other operators" in Part 1(c), where BR paraphrases the requirements of section 33 of the Act, in relation to its duty of fairness. Required Amendment 1 of the Draft decision is:

BR's proposed Segregation Arrangements should be amended such that Part 1(c) reads as follows:

Section 33 of the Act relating to the duty of fairness which requires that relevant officers in performing their duties must not have regard to the interests of the railway owner in a way that is unfair to persons seeking access or to other operators.

Comments in Submissions

30. BR submitted that it does not agree with the Authority's reading of the definition of "access-related functions" provided in Section 24 of the Act, and therefore that Part 1(c) of its Segregation Arrangements should not conform with the wording in the Section 33 of the Act, but should include a reference to persons with contracts outside the Code. BR therefore suggested that Part 1(c) refer to "Proponents or Network Participants"⁴ rather than "persons seeking access or to other operators".
31. BR had proposed initially that Part 1(c) refer to "persons seeking access" and did not refer to "Proponents or Network Participants".

³ Section 30 requires a railway owner to satisfy the provisions of Sections 31 to 34, which relate to the protection of confidential information, avoidance of conflict of interest, duty of fairness and maintenance of separate accounts and records, respectively.

⁴ BR provides a meaning for "Network Participant" as "an Access Holder or an Operator, as applicable". BR provides a meaning for "Access Holder" as "a party that is granted Access under a Commercial Track Access Agreement or a Track Access Agreement, as applicable"

Authority Assessment

32. The Authority considers that a proponent is a person seeking access and need not be separately identified in Part 1(c) of the proposed Segregation Arrangements. The Authority considers that railway owners are required by section 33 of the Act to have a duty of fairness to persons seeking access who are not proponents (that is, persons who have not yet made a proposal under Section 8 of the Code). The Authority considers that “other operators” should be identified in this part, in order for the Segregation Arrangements to meet the requirements of section 33 of the Act.

Required Amendment

Required Amendment 1

BR’s proposed Segregation Arrangements should be amended such that Part 1(c) reads as follows:

Section 33 of the Act relating to the duty of fairness which requires that relevant officers in performing their duties must not have regard to the interests of the railway owner in a way that is unfair to persons seeking access or to other operators.

Part 2 – Access related functions

33. Part 2 of the proposed Segregation Arrangements provides a definition of access related functions. This part mirrors the purpose and structure of Part 2 of BR’s current Segregation Arrangements.
34. “Access-related functions” is defined in the Act at section 24 as “the functions involved in arranging the provision of access to railway infrastructure under the Code”. The term “access agreement” is defined in the Code at section 3 as “an agreement in writing under this Code between the railway owner and an entity for access by that entity”.
35. The Code at section 4A(1)(b) states that “if the parties choose to negotiate an agreement for access otherwise than under the Code, nothing in this Code applies to or in relation to the negotiations or any resulting agreement.”
36. The proposed Segregation Arrangements provide for arrangements to be put in place in respect of access agreements “made inside or outside the Code”. In Part 2 of the proposed Segregation Arrangements, this is evident at 2(a)(iv) where reference is made to “Access Agreements inside the Code”, and at 2(b) where reference is made to “Access Agreements (either inside or outside the Code)”.
37. BR removed references to agreements made outside the Code from its Train Management Guidelines and Train Path Policy in 2013.
38. The proposed Segregation Arrangements at Part 2(a)(i) identifies “calculating floor and ceiling costs” as an access-related function. The Authority has ceased referring to “floor and ceiling costs” as these are not terms defined in the Code. The Authority now refers to these costs as “incremental costs” and “total costs”. These terms are defined in the Code at schedule 4 clause 1.

39. References to access agreements “inside and outside the Code” and to “floor and ceiling costs” are carried over from BR’s current Segregation Arrangements.
40. In its draft decision, the Authority considered that references to “floor” and “ceiling” costs should be replaced with references to “incremental” and “total” costs, to be consistent with terms defined in the Code.
41. In its draft decision, the Authority considered that references to access agreements “made outside the Code” should be removed from the document, as agreements made outside the Code are not access agreements. This means that, in terms of section 28 of the Act, a function associated with an agreement made outside the Code is not an “access-related function”, but an “other function”.
42. In its draft decision, the Authority agreed with a submission⁵ that limiting the definition of “Confidential Information” in Part 2A(a) to Confidential Information in relation to Access Related Functions limits the scope of confidential information which is defined in the Act as “confidential information relating to the affairs of persons seeking access”.
43. In its draft decision, the Authority required the following amendment to Part 2 of BR’s proposed Segregation Arrangements (Required Amendment 2):
- Part 2 of BR’s proposed Segregation Arrangements should be amended such that:*
- *the words “For the purposes of these Segregation Arrangements, ‘Access Related Functions’ means” in the preamble are replaced with “Access Related Functions has the meaning given to the term ‘access-related functions’ in section 24 of the Act, and includes:”*
 - *the words “floor and ceiling” are replaced with “incremental and total” in Part 2(a)(i)*
 - *the words “inside the Code” are removed from Part 2(a)(iv)*
 - *the words “(either inside or outside of the Code)” are removed from Part 2(b)*
- Part 2A of BR’s proposed Segregation Arrangements should be amended such that:*
- *The words “with respect to Access Related Functions” are removed from part 2A(a)(ii)*

Comments in Submissions

44. Aurizon submitted that limiting “access-related functions” to only Code agreements creates uncertainty, may result in contracts outside the Code not being covered by the Segregation Arrangements, and would be inconsistent with Section 33 of the Act. Aurizon submitted that Section 33 makes no distinction between an operator inside or outside the Code.
45. Aurizon submitted that if the Segregation Arrangements does not protect the confidential information of an above-rail entity with an out-of-Code contract with a

⁵ CBH submission dated 29 October 2015, page 12.

vertically separated railway owner, then this could be harmful to any subsequent negotiation under the Code if the railway owner vertically integrates.

46. Aurizon commented that the effect of adopting the required amendment would be that staff involved in negotiating with parties inside the Code must be distinct from those negotiating with parties outside the Code, and that Regulatory accounts must be prepared in relation to Code agreements only.
47. BR submitted that it disagrees that the definition of “access-related functions” in section 24 of the Act should be interpreted as meaning that access-related functions relate only to agreements made inside the Code. BR submitted that the words “under the Code” in section 24 of the Act attaches to the words “railway infrastructure” and do not attach to the words “the provision of access”.
48. BR submitted that Hansard records indicate that the aim of segregation was to separate above- and below-rail operations, in the context of a vertically integrated railway.

Authority Assessment

49. The Authority considers that the words “under the Code” as used in the specific definition of “access-related functions” qualifies the concept of “arranging the provision of access to railway infrastructure”.
50. The Authority considers that it would be redundant for the words “under the Code” to be attached to the term “railway infrastructure”, as the railway infrastructure subject to the Code is defined in section 3 of the Act and section 3 of the Code, and the particular routes subject to the Code are listed in schedule 1 to the Code.
51. The Authority agrees with Aurizon that adopting the required amendment will result in contracts outside the Code not being covered by the Segregation Arrangements. The Authority does not agree with Aurizon’s submission that this would be inconsistent with Section 33 of the Act, and that Section 33 makes no distinction between an operator inside or outside the Code. The term “operator” is defined in section 3 of the Code as “an entity to which access is provided under an access agreement”.
52. The Authority has noted Aurizon’s comment that if the Segregation Arrangements do not protect an above-rail entity with an out-of-Code contract with a vertically separated railway owner, then this could be harmful to any subsequent negotiation under the Code if the railway owner vertically integrates.
53. The Authority recognises that this may apply both in relation to an above rail entity moving their negotiations from outside the Code to inside the Code, and to an above rail entity negotiating outside the Code with a railway owner who becomes vertically integrated.
54. The Authority agrees with Aurizon that adopting the required amendment would require staff involved in negotiating with parties inside the Code being different from those negotiating with parties outside the Code, and that Regulatory accounts must be prepared in relation to Code agreements only.
55. In relation to BR’s submission referring to the aim of segregation recorded in Hansard, the Authority is aware of the limited assistance that Hansard can provide in construing the meaning of a provision. For example, in recent cases the High Court has emphasised that the task of statutory construction starts and ends with

the text of the provision, and while the wider context (including second reading speeches) may, in some cases, assist in understanding the policy behind a statute, such extrinsic materials "cannot be relied on to displace the clear meaning of the text".⁶

56. The Authority confirms its view that, in terms of the requirements of section 28 of the Act, functions associated with access agreements must be segregated from functions associated with negotiations and contracts made outside the Code.

Required Amendment

Required Amendment 2

Part 2 of BR's proposed Segregation Arrangements should be amended such that:

- the words "For the purposes of these Segregation Arrangements, 'Access Related Functions' means" in the preamble are replaced with "Access Related Functions has the meaning given to the term 'access-related functions' in section 24 of the Act, and includes:"
- the words "floor and ceiling" are replaced with "incremental and total" in Part 2(a)(i)
- the words "inside the Code" are removed from Part 2(a)(iv)
- the words "(either inside or outside of the Code)" are removed from Part 2(b)

Part 2A of BR's proposed Segregation Arrangements should be amended such that:

- The words "with respect to Access Related Functions" are removed from part 2A(a)(ii)

Part 3 – Management and Compliance Processes

57. Part 3 of the proposed Segregation Arrangements refers to an Appendix A, which is titled 'Management and Compliance Processes'. This part mirrors the purpose and structure of Part 3 of BR's current Segregation Arrangements.
58. Part 3 at 3(e)(iv) includes reference to a compliance plan and auditors.
59. The Authority notes that the provisions of Part 3(d) of the Segregation Arrangements are equivalent to the current Segregation Arrangements, and that the Management and Compliance Processes is a controlled document. The Authority does not consider that it is necessary for all BR employees to be issued with this document, and that the term "relevant officer" as defined⁷ in section 24 of the Act should be used in place of 'employee'.

⁶ *Alcan v. Commissioner of Territory Revenue* (2009) 239 CLR 27 @ [47].

⁷ Relevant officer is defined in section 24 of the Act to mean "an officer or employee of a railway owner who is in any way concerned in the performance of access-related functions".

60. For reasons given at paragraph 123, the Authority does not consider that references to a compliance plan or to auditors is required.
61. In its draft decision, the Authority required the following amendment to Part 3 of BR's proposed Segregation Arrangements (Required Amendment 3):
- Part 3 of BR's proposed Segregation Arrangements should be amended such that:*
- *The words "BR staff" are replaced with "relevant officer" in Part 3(d)*
 - *Part 3(e)(iv) is removed.*

Comments in Submissions

62. BR commented that replacing the words "BR Staff" with "relevant officer", makes the words "who are involved in access-related functions" redundant also, and that these words should be removed along with "BR Staff".

Authority Assessment

63. The Authority agrees with BR's comment that the words "who are involved in access-related functions" should be removed, along with "BR Staff", from Part 3 of its Segregation Arrangements.

Required Amendment

Required Amendment 3

Part 3 of BR's proposed Segregation Arrangements should be amended such that:

- The words "BR staff who are involved in Access-Related Functions" are replaced with "relevant officer" in Part 3(d)
- Part 3(e)(iv) is removed.

Part 4 – Confidential Information

64. Part 4 of the proposed Segregation Arrangements describes the obligations of BR in relation to confidential information. This part mirrors the purpose and structure of Part 4 of BR's current Segregation Arrangements, with the following additions:
- Part 4(c) which provides for circumstances under which BR may disclose confidential information
 - Part 4(f) which provides for BR to disclose confidential information in aggregated form such that it cannot be attributed to a particular person
65. The additional provisions at Part 4(c), relating to circumstances under which BR may disclose confidential information, includes reference to "Access Dispute" and "Price Dispute". These terms are defined in the Definitions part and these definitions refer to a Dispute Resolution Process which is outlined in Appendix C to the Segregation Arrangements and which is distinct from the dispute resolution process outlined in Part 3 of the Code.

66. BR's current Segregation Arrangements refers to confidential information belonging to "persons seeking access" and "proponents". As detailed in paragraph 28, a proponent is considered to be a person seeking access, along with an "entity that is interested in making a proposal" as referred to in Section 7 of the Code.
67. BR's proposed Segregation Arrangements refers to confidential information belonging to "Network Participants" and "Proponents". Network Participant is not a term defined in the Code. BR has provided definitions (in the Definition part) which proposes that a Network Participant be defined as an operator (an entity with an access agreement) or an entity with an agreement outside the Code.
68. BR's proposed Segregation Arrangements do not provide protection for confidential information owned by all persons seeking access, that is proponents and "entities interested in making a proposal" as referred to in section 7 of the Code.
69. Section 31 of the Act requires that confidential information "relating to the affairs of persons seeking access or rail operators" must be protected.
70. In its draft decision, the Authority required the following amendment to Part 4 of BR's proposed Segregation Arrangements (Required Amendment 4):

Part 4 of BR's proposed Segregation Arrangements should be amended such that:

- *The words "Network Participant or Proponent" are replaced with "person seeking access or operator". This is required at 4(a)(i), 4(a)(ii), 4(c), 4(c)(i), 4(c)(iv), and 4(f)*
- *Part 4(b)(i) is replaced with "Proposals and preliminary information from persons seeking access"*
- *The words "such consent not to be unreasonably withheld" are removed from 4(c)(i)*
- *The words "an Access Dispute or a Price Dispute" in 4(c)(iv) are replaced with "a dispute"*

Comments in Submissions

71. Aurizon submitted that confidential information is broader than information provided by the access seeker and also includes data collected in the provision of access rights. Aurizon submitted that the words "or collected by," be added after "Confidential Information provided to, " in Part 4(a)(i).
72. BR submitted that the words "Proposals and preliminary information from Proponents" be used in place of "Proposals and preliminary information from persons seeking access" in Part 4(b)(i).
73. BR submitted that the words "in accordance with, or as permitted by, an Access Agreement" be added as a permissible circumstance under which BR may disclose confidential information in Part 4(c).

Authority Assessment

74. The Authority agrees with Aurizon’s comment that confidential information may be collected by BR from an operator (and under certain circumstances from a person seeking access) and should be protected along with information provided to BR by those entities.
75. The Authority considers that a person seeking access may provide the railway owner with confidential information prior to a proposal being made in accordance with section 8. The Authority considers that the term “persons seeking access” includes proponents, but that the term “proponent” does not encompass all persons seeking access, and in particular does not include “an entity that is interested in making a proposal” as referred to in Section 7 of the Code, who has not yet made a proposal in accordance with Section 8 of the Code. The Authority therefore does not agree with BR’s submission that the words “Proposals and preliminary information from Proponents” be used in Part 4(b)(i).
76. The Authority agrees with BR that if an operator has agreed to a confidentiality arrangement in its access agreement then the Segregation Arrangements should not override that agreement, and therefore that the words “in accordance with, or as permitted by, an Access Agreement” be added as a permissible circumstance under which BR may disclose confidential information in Part 4(c).
77. The Authority considers that it is not appropriate for the Segregation Arrangements to refer to dispute resolution procedures other than the dispute resolution procedures outlined in Part 3 Division 3 of the Code.

Required Amendment

Required Amendment 4

Part 4 of BR’s proposed Segregation Arrangements should be amended such that:

- The words “Network Participant or Proponent” are replaced with “person seeking access or operator”. This is required at 4(a)(i), 4(a)(ii), 4(c), 4(c)(i), 4(c)(iv), and 4(f)
- the words “or collected by,” are added after “Confidential Information provided to,” in Part 4(a)(i)
- Part 4(b)(i) is replaced with “Proposals and information provided by persons seeking access”
- The words “such consent not to be unreasonably withheld” are removed from 4(c)(i)
- The words “an Access Dispute or a Price Dispute” in 4(c)(iv) are replaced with “a dispute”
- The words “in accordance with, or as permitted by, an Access Agreement” are added as a sub-clause to Part 4(c)

Part 5 – Conflicts of Interest

78. Part 5 of the proposed Segregation Arrangements makes provisions for the management of conflicts of interest. This part mirrors the purpose and structure of Part 5 of BR's current Segregation Arrangements with the addition of substantial additional provisions associated with managing interactions with "Related Operators" and "Related Body Corporate".
79. Definitions of Related Operators and Related Body Corporate are provided in the 'Definitions' part of the proposed Segregation Arrangements.
80. The definition provided for Related Body Corporate is the same as defined in the Code which is the same as that given in the Corporations Law (*Corporations Act 2001*).
81. The term "associate" is defined in the Code as a related body corporate and a unit trust, joint venture or partnership where the interest of the railway owner or of a related body corporate entitles that entity to control the board composition, voting or business affairs of the unit trust, joint venture or partnership.
82. The Code refers to the railway operations of the railway owner only in terms of its own operations or the railway operations of an associate. This is at section 16(3) of the Code, where *rail operations of the railway owner* includes the rail operations of an associate of the railway owner, and at clause 13(a) of Schedule 5 to the Code, where the railway owner is required to ensure consistency in pricing for rail operations carried out by a railway owner or an associate.
83. The term "Related Operator" is not a Code-defined term. The Definitions part of the proposed Segregation Arrangements defines Related Operator as "a Network Participant which is a Related Body Corporate of BR". This definition presents an inconsistency between the BR definition of Network Participant – which is an entity with an access agreement or an agreement outside the Code – and the Code definition of an operator, which is an "entity to which access is provided under an access agreement".
84. Part 5(f) of the proposed Segregation Arrangements refers to a deed between BR and the relevant holding company of its Related Operator, as at the date of these Segregation Arrangements.
85. Part 5(g) introduces the term "Common Directors", for which a definition is provided at 5(j).
86. In the draft decision, the Authority agreed with a submission from CBH, in relation to Part 5(e), that a restriction period of 6 months is inadequate as commercial information at that time is likely to still have high commercial value, and is capable of being exploited in favour of an associate of the railway owner.
87. In its draft decision, the Authority required the following amendment to Part 5 of BR's proposed Segregation Arrangements (Required Amendment 5):

Part 5 of BR's proposed Segregation Arrangements should be amended such that:

- *The words "six months" are replaced with "two years" and the words "employee of BR who has had access to Confidential Information of a*

Network Participant or a Proponent” are replaced with “relevant officer” in 5(e)

- *The words “Network Participant or Proponent” are replaced with “person seeking access or operator” in 5(h)(iv)*
- *The words “Related Operator” are replaced with “associate”. This is required at 5(h)(iii), 5(h)(iv), 5(j)(ii)*
- *5(f) is removed*

Comments in Submissions

88. BR submitted that the required amendment to Part 5(j)(ii) would significantly expand the prohibition on joint board membership and would require that the board of Brookfield Rail be wholly independent of the Brookfield group. BR submitted that it is not feasible for Brookfield Rail’s parent company to be prohibited from having directors on the board of its subsidiary.
89. BR submitted that the words “(as defined in the Act)” in Part 5(a) of its proposed Segregation Arrangements are redundant and should be removed.
90. BR submitted that the term “Related Body Corporate” should be replaced with the term “Associate” in Parts 5(c), 5(d), 5(e).
91. BR submitted that the two year “stand-down period” for a relevant officer - after ceasing employment with BR, prior to being employed or engaged with an associate in a role which is involved in commercial dealings with operators or proponents – is excessive. BR submitted that the proposed six months period is adequate. BR submitted that The Pilbara Infrastructure is not subject to equivalent stand-down obligations.

Authority Assessment

92. The Authority considers that the term “associate” as defined in the Code should apply in the place of the term “Related Operator”, to ensure consistency with the definition and use of the term in the Code. The railway operations of a railway owner’s associate may be enabled by either an access agreement or an agreement outside the Code, whereas the term “operator” is defined in the Code to mean an entity with an access agreement which is an agreement made only under the Code.
93. In relation to Part 5(d) the Authority considers that the scope of this provision has been widened to encompass requests for preliminary information by the inclusion of the term “person seeking access”.
94. The Authority considers that Part 5(d) provides adequate assurance that the broader requirements of segregation are considered by BR when transferring employees between business units, and that provisions in addition to those previously provided for by BR in its Segregation Arrangements are not warranted.
95. The Authority accepts BR’s submission that it is not feasible for Brookfield Rail’s parent company to be prohibited from having directors on the board of its subsidiary. The Authority therefore considers that the term ‘Related Operator’ in Part 5(j) be replaced with ‘Related Body Corporate which undertakes operations on the network’.

96. The Authority does not consider the inclusion of Part 5(f) is appropriate, as neither the holding company nor the Related Operator is named, and the deed is not included for consideration as part of the proposed Segregation Arrangements.
97. In relation to BR's proposed six month stand-down period, the Authority has not received a comment from BR in relation to *Co-operative Bulk Handling Ltd v Brookfield Rail Pty Ltd (no 2) [2014] WASC 38* wherein at Appendix 2 of the judgement, BR proposed restrictions which required any party which inspects confidential material to refrain for two years from being involved in negotiations, drafting of contracts or arbitrations in relation to the BR network. The Authority has noted BR's comment that The Pilbara Infrastructure is not subject to equivalent stand-down obligations.
98. The Authority has noted the provisions of section 4.3.1 of The Pilbara Infrastructure Segregation Arrangements which require a 12 month stand-down period for employees involved in access-related functions for TPI, being employed elsewhere in the Fortescue Metals Group.⁸
99. The Authority has noted BR's submission that a six month stand down period is adequate. The Authority considers that, in view of the precedent established in The Pilbara Infrastructure Segregation Arrangements, and the restrictions proposed by BR in the WA Supreme Court (WASC 38), that a 12 month stand-down period is appropriate.

Required Amendment

Required Amendment 5

Part 5 of BR's proposed Segregation Arrangements should be amended such that:

- The first sentence of 5(a) reads "BR will manage its Access Related Functions so that, for BR's Relevant Officers no conflicts of interest exist between his or her duties:"
- The words "six months" are replaced with "one year" and the words "employee of BR who has had access to Confidential Information of a Network Participant or a Proponent" are replaced with "relevant officer" in 5(e)
- The words "Network Participant or Proponent" are replaced with "person seeking access or operator" in 5(h)(iv)
- The words "Related Operator" are replaced with "associate" in Parts 5(c), 5(d), 5(e), 5(h)(iii), and with "related body corporate which undertakes operations on the network" in Part 5(j)
- 5(f) is removed

⁸ TPI precludes the transfer of staff involved in access-related functions to positions involved in performing other functions where the occupant is required to sign TPI's Segregation Awareness Statement, except where the person first spends at least one year undertaking other access-related functions within the Rail Infrastructure Division which do not require the signing of TPI's Segregation Awareness Statement.

Part 6 – Duty of Fairness and Non-discrimination

100. Part 6 of the proposed Segregation Arrangements provides assurances relating to the duty of fairness obligations of BR under section 33 of the Act. This part contains substantial provisions additional to BR's current Segregation Arrangements, including references to the hindrance provisions of the Act, the prospect of permissible discrimination and a dispute resolution process specified in Appendix C of the proposed Segregation Arrangements.
101. In Part 6.3, the additional provisions relating to permissible discrimination relate to discrimination on price only, and not to the requirements of section 16 of the Code "General duties of a railway owner in negotiations". These duties relate to avoiding discrimination between the proposed operations of a proponent and the rail operations of the railway owner in the allocation of train paths, train control and operating standards.
102. The Code provides for fairness in price negotiation at clause 13 of Schedule 4. The Act makes provisions relating to hindrance or preventing access at section 34A. Section 30 of the Act does not require either of the above-mentioned provisions of the Code or the Act to be satisfied by a railway owner in carrying out its obligations under section 28.
103. BR's proposed Segregation Arrangements document does not include statements ensuring that persons seeking access, including those who initiated negotiations outside the Code, will be informed of their rights to confidentiality, which appear as the last two paragraphs of part 6 of BR's current Segregation Arrangements.
104. In its draft decision, the Authority required the following amendment to Part 6 of BR's proposed Segregation Arrangements (Required Amendment 6):

Part 6 of BR's proposed Segregation Arrangements should be amended such that:

- *The words "and Non-discrimination" are removed from the title of that part.*
- *The words "Network Participant" and "Proponent" are replaced with "person seeking access and operator" in section 6.1.*
- *Parts 6.2, 6.3 and 6.4(a) are removed*
- *The text contained in the last two paragraphs of part 6 of BR's current Segregation Arrangements, or words to that effect, are included in part 6 of the proposed Segregation Arrangements*

Comments in Submissions

105. No comments were provided in submissions. BR indicated its acceptance of the required amendments in the draft decision by the suggested edits shown in the attachment to its submission.

Authority Assessment

106. The Authority considers that reference to “discrimination” is not appropriate in the title to Part 6, or in Part 6.2(b), as the requirements of section 33 relate to a duty of fairness only, and provisions relating to discrimination appear in the Code.
107. The Authority considers that the statement at Part 6.2(a) is not appropriate, as section 34A of the Act prohibits hindrance or preventing access, and does not make allowance for hindrance or prevention on fair or reasonable grounds.
108. The Authority considers that the additional provisions in BR’s proposed Segregation Arrangements at Part 6.3 are not necessary and may limit the Regulator’s discretion in relation to the exercise of its duties, if required, under section 21 of the Code. Clause 13 of Schedule 4 of the Code provides guidelines for the negotiation of prices and makes reference to permissible differentiation on the basis of the operations proposed to be carried out, the costs and risks of access, the characteristics of the infrastructure concerned and relevant market conditions.
109. The Authority considers that the statement at Part 6.2(b) of BR’s proposed Segregation Arrangements is adequate reference to discrimination for the purposes of meeting BR’s obligations under section 28 and 30 of the Act.
110. BR’s proposed Segregation Arrangements provides at Part 6.4(c) for a dispute mechanism to apply in negotiations with other entities (persons seeking access other than under the Code). The Authority considers that reference to a dispute resolution mechanism separate from that detailed in Part 3 of the Code is not appropriate. The Authority considers that BR may include a dispute mechanism within its standard access agreement, to facilitate the resolution of any disputes following completion of negotiations.
111. The Authority considers that the statements referred to in paragraph 103 above, which are included in BR’s current Segregation Arrangements, but not included in BR’s proposed Segregation Arrangements, assist in ensuring that all entities who may seek to undertake rail operations outside the Code fully understand the protections available to them under the Code.

Required Amendment

Required Amendment 6

Part 6 of BR’s proposed Segregation Arrangements should be amended such that:

- The words “and Non-discrimination” are removed from the title of that part.
- The words “Network Participant” and “Proponent” are replaced with “person seeking access and operator” in section 6.1.
- Parts 6.2, 6.3 and 6.4(a) are removed.
- The text contained in the last two paragraphs of part 6 of BR’s current Segregation Arrangements, or words to that effect, are included in part 6 of the proposed Segregation Arrangements.

Part 7 – Preparation of Accounts and Records

112. Part 7 of the proposed Segregation Arrangements refers to BR's obligation to maintain accounts and records in such a form that accounts and records relating to BR's access-related functions are distinguished from accounts and records related to its other functions. This part mirrors the purpose and structure of Part 7 of BR's current Segregation Arrangements, and is identical in wording except for naming conventions.
113. In its draft decision, the Authority did not require any amendments to Part 7 of BR's proposed Segregation Arrangements

Comments in Submissions

114. There were no comments received in submissions relating to Part 7 of BR's proposed Segregation Arrangements.

Authority Assessment

115. The Authority does not require any amendments to Part 7 of BR's proposed Segregation Arrangements.

Part 8 – Audit, Compliance and Review

116. Part 8 of the proposed Segregation Arrangements relates to Audit, Compliance and Review provisions attached to the proposed Segregation Arrangements. None of the text contained in Part 8 of BR's current Segregation Arrangements has been carried over to Part 8 of the proposed Segregation Arrangements.
117. The principle differences between Parts 8 of the current and proposed Segregation Arrangements are that the proposed Segregation Arrangements document:
- Does not nominate a review date for Segregation Arrangements
 - Provides for an annual audit of the Segregation Arrangements, instead of every two years as at present
 - Does not allow for the Regulator to determine the scope of the audit, as at present, but nominates a scope of audit to apply
118. The Authority in 2013 approved amendments to The Pilbara Infrastructure's Segregation Arrangements which removed requirements for regular review and annual audits, on the grounds that the Act and the Code provide power sufficient for the Regulator to commission audits on any issue associated with the Segregation Arrangements at any time, and can require amendments to be made to the Segregation Arrangements with or without the railway owner's agreement.
119. In its draft decision, the Authority required the following amendment to Part 8 of BR's proposed Segregation Arrangements (Required Amendment 7):

Part 8 of BR's proposed Segregation Arrangements should be amended such that:

- *The word "Audit" is removed from the title of that part*

- *The words “Network Participant or Proponent” are replaced with “person seeking access or operator” at 8.1(a)*
- *The words “Section 29 also allows the Regulator to require amendments to BR’s Segregation Arrangements, with or without BR’s agreement” and “The Act and the Code provide powers sufficient for the Regulator to require special audits on any issue relating to the Segregation Arrangements at any time” and “Any audit required by the Regulator will be carried out by an independent auditor approved by the ERA, with BR managing and funding the audit” to be inserted following 8.1(c)*
- *Parts 8.2, 8.3 and 8.4 are removed*

Comments in Submissions

120. Aurizon submitted that a railway owner should be able to voluntarily submit its compliance to audit, and whilst the Act may not require an annual compliance audit, this should not preclude the Regulator from accepting a proposal for voluntary audits.
121. BR indicated its acceptance of the required amendments in the draft decision, by the suggested edits shown in the attachment to its submission.

Authority Assessment

122. The Authority considers that it is appropriate for the Segregation Arrangements to refer to the powers of the Regulator to investigate railway owners’ compliance with the Segregation Arrangements at any time, and to require amendments to be made to the Segregation Arrangements.
123. The Authority has previously decided that mandatory audits of TPI’s Segregation Arrangements are not warranted, as the Act and the Code provide power sufficient for the Regulator to commission audits on the Segregation Arrangements at any time. The Authority considers that the scheduling of regular audits may compromise the consideration of requirements for special audits that may otherwise be justified from time to time.
124. The Authority has noted that the audit provisions in BR’s proposed Segregation Arrangements are a carry-over from previous Segregation Arrangements.

Required Amendment

Required Amendment 7

Part 8 of BR's proposed Segregation Arrangements should be amended such that:

- The word "Audit" is removed from the title of that part
- The words "Network Participant or Proponent" are replaced with "person seeking access or operator" at 8.1(a)
- The words "Section 29 also allows the Regulator to require amendments to BR's Segregation Arrangements, with or without BR's agreement" and "The Act and the Code provide powers sufficient for the Regulator to require special audits on any issue relating to the Segregation Arrangements at any time" and "Any audit required by the Regulator will be carried out by an independent auditor approved by the ERA, with BR managing and funding the audit" to be inserted following 8.1(c)
- Parts 8.2, 8.3 and 8.4 are removed

Part 8A – Dispute Resolution

125. Part 8A of the proposed Segregation Arrangements relates to a dispute resolution procedure detailed in an Appendix to the proposed Segregation Arrangements.
126. The dispute resolution procedure appears to be intended to apply in situations where the dispute resolution process in Part 3 of the Code does not apply – that is, to the negotiation of agreements made outside the Code.
127. In its draft decision, the Authority required the following amendment to Part 8A of BR's proposed Segregation Arrangements (Required Amendment 8):

BR's proposed Segregation Arrangements should be amended such that part 8A is removed:

128. In its draft decision, the Authority required the following amendment to Appendix C of BR's proposed Segregation Arrangements (Required Amendment 9):

BR's proposed Segregation Arrangements should be amended such that Appendix C is removed

Comments in Submissions

129. There were no comments received in submissions relating to Part 8A or Appendix C of BR's proposed Segregation Arrangements. BR indicated its acceptance of required amendments to these parts by the edits shown in the attachment to its submission.

Authority Assessment

130. The Authority considers that Part 3 of the Code provides for adequate dispute resolution associated with negotiations, and that access agreements may

incorporate dispute resolution mechanisms, as indicated at Part 6.4(c) of BR's proposed Segregation Arrangements.

131. The Authority does not consider it appropriate for BR's Segregation Arrangements to detail a dispute resolution mechanism which would apply to negotiations conducted outside the Code.

Required Amendment

Required Amendment 8

BR's proposed Segregation Arrangements should be amended such that part 8A is removed

Required Amendment 9

BR's proposed Segregation Arrangements should be amended such that Appendix C is removed

Definitions

132. The Definitions part of BR's proposed Segregation Arrangements provides meanings for terms used in the document.
133. Required Amendment 10 of the draft decision provided amendments to definitions consistent with other amendments required by the Authority

Comments in Submissions

134. There were no comments received in submissions relating to the Definitions part of BR's Segregation Arrangements.

Authority Assessment

135. The Authority requires amendments to the Definitions part of BR's proposed Segregation Arrangements consistent with the reasoning and effect of the amendments required elsewhere in this decision document.

Required Amendment

Required Amendment 10

The Definitions part of BR's proposed Segregation Arrangements should be amended such that:

- “Access” is defined to have the meaning ascribed to the term “access” in section 3 of the Code
- “Access Agreement” is defined to have the meaning ascribed to the term “access agreement” in section 3 of the Code
- “Access Related Functions” is defined to have the meaning ascribed to the term “access-related functions” in section 24 of the Act
- “Confidential Information” is defined to have the meaning ascribed to the term “confidential information” in section 31(2) of the Act
- “Operator” is defined to have the meaning ascribed to the term “operator” in section 3 of the Code
- “Proponent” is defined to have the meaning ascribed to the term “proponent” in section 3 of the Code
- The term “person seeking access” is added and is defined to mean a person who has made a request in accordance with section 7 of the Code or who has made a proposal in accordance with section 8 of the Code
- The term “associate” is added and defined to have the meaning ascribed to it in section 3 of the Code
- The term “relevant officer” is added and defined to have the meaning ascribed to it in section 24 of the Act
- References to the following terms are removed:
 - Access Dispute
 - Access Holder
 - Auditor
 - Dispute Applicant
 - Dispute Resolution Process
 - Disputed Access Charge
 - Final Dispute Notice
 - Independent Price Expert
 - Network Participant
 - Objection Notice
 - Price Dispute
 - Related Operator

Appendix A – Management and Compliance Processes

136. Appendix A – Management and Compliance Processes – of BR’s proposed Segregation Arrangements outlines the management processes BR will have in place to meet its segregation obligations. Appendix A of BR’s proposed Segregation Arrangements mirrors the purpose and structure of Appendix A of BR’s current Segregation Arrangements.
137. A point of difference between Appendix A in BR’s current and proposed Segregation Arrangements is that the current Segregation Arrangements includes a list of designated position titles alongside specific responsibilities in the Appendix A part titled “2. Responsibilities and Authorities”, and the proposed Segregation Arrangements does not. The proposed Segregation Arrangements states only that position descriptions are prepared for each designated position and that these position descriptions describe the functional areas of responsibility. The proposed Segregation Arrangements does not list the designated positions.
138. Similarly, the Appendix A part titled “3.2. Confidential Information – General Management of Confidential Information” in the current Segregation Arrangements includes a list of generic personnel groupings required to undertake Access Segregation Arrangements Training and sign a Confidentiality and Compliance Agreement”, and the proposed Segregation Arrangements does not. The proposed Segregation Arrangements states only that BR will maintain such a list.
139. In the Appendix A Part 3.4 “Duty of Fairness”, BR has included a list of permissible discriminations in the Proposed Segregation Arrangements, which do not appear in the current Segregation Arrangements, and has removed statements which indicate a commitment to inform entities who are negotiating out of Code of their rights to confidentiality under the Code.
140. In its draft decision, the Authority required the following amendment to Appendix A of BR’s proposed Segregation Arrangements (Required Amendment 11):

The Appendix A of BR’s proposed Segregation Arrangements should be amended such that:

- *In Part 2, the term “designated position” is replaced with “Responsible Manager”, and the words “BR will maintain a current list of Responsible Managers” are added*
- *In Part 2, that the list of functional responsibilities from the equivalent Part 2 of the current Segregation Arrangements is included*
- *The wording of Part 3.2(a) is changed to “proposals and preliminary information provided by persons seeking access”*
- *Part 3.2 (e) includes the list of generic position groups from the equivalent Part 3.2 of the current Segregation Arrangements, with amendments to reflect current naming conventions*
- *The words “Network Participant or Proponent” are replaced with “person seeking access or operator”. This is required at Parts 3.4(a), 3.4(b)(ii), 4.1, 4.3*

- *Parts 3.4(b)(i), 3.4(c) and 3.4(d)(i) are removed*
- *The paragraph in Part 4.1 beginning with the words “If the Regulator considers” is removed*
- *The text contained in the last two paragraphs of Part 6 of BR’s current Segregation Arrangements, or words to that effect, are included in Part 3.4*
- *The words “These measures are in addition to the audits conducted in accordance with section 8 of the Segregation Arrangements” in Part 4.1 are removed*
- *The words “Also no Board member of BR is permitted to be a board member or executive member of any above rail operator. Should at any time, there be evidence to the contrary, this would be classified as a breach” are added to Part 4.3*
- *The first paragraph of the dot point of Part 4.4 “Application for Access” reads “Subject to section 6.3 of the Segregation Arrangements, a person seeking access is not provided with a fair response to a request under section 7 of the Code or a proposal”*
- *The words “Related Operator” is replaced with “Network Participant” in the second dot point of part 4.4 “Access Negotiation”*
- *The words “Network Participant” is replaced with “Operator” in the second dot point of Part 4.4 “Access Negotiation”*
- *Part 5 is removed*

Comments in Submissions

141. Aurizon did not provide any comments in relation to Appendix A of BR’s proposed Segregation Arrangements.
142. BR indicated its acceptance of Required Amendment 11 to the extent of edits shown in the attachment to its submission, including some minor additional suggested edits.

Authority Assessment

143. The Authority confirms Required Amendment 11, as below.
144. The Authority has included two additional dot point amendments below (the fifth and ninth) consistent with suggestions made by BR in the attachment to its submission, which are considered to be material. Further edits suggested by BR are considered to be inconsequential and have not been included in Required Amendment 11, but may be considered by the Authority in the process of finalising the Segregation Arrangements.

Required Amendment

Required Amendment 11

The Appendix A of BR's proposed Segregation Arrangements should be amended such that:

- In Part 2, the term “designated position” is replaced with “Responsible Manager”, and the words “BR will maintain a current list of Responsible Managers” are added
- In Part 2, that the list of functional responsibilities from the equivalent Part 2 of the current Segregation Arrangements is included
- The wording of Part 3.2(a) is changed to “proposals and preliminary information provided by persons seeking access”
- Part 3.2 (e) includes the list of generic position groups from the equivalent Part 3.2 of the current Segregation Arrangements, with amendments to reflect current naming conventions
- The word “will” is replaced by the word “may” in Parts 3.2.2(d) and 3.2.3(g)
- The words “Network Participant or Proponent” are replaced with “person seeking access or operator”. This is required at Parts 3.4(a), 3.4(b)(ii), 4.1, 4.3
- Parts 3.4(b)(i), 3.4(c) and 3.4(d)(i) are removed
- The paragraph in Part 4.1 beginning with the words “If the Regulator considers” is removed
- The words “Subject to section 1.1 of the Segregation Arrangements” is removed from Part 4.4 (in four instances)
- The text contained in the last two paragraphs of Part 6 of BR's current Segregation Arrangements, or words to that effect, are included in Part 3.4
- The words “”These measures are in addition to the audits conducted in accordance with section 8 of the Segregation Arrangements” in Part 4.1 are removed
- The words “Also no Board member of BR is permitted to be a board member or executive member of any above rail operator. Should at any time there be evidence to the contrary this would be classified as a breach” are added to Part 4.3
- The first paragraph of the dot point of Part 4.4 “Application for Access” is changed to “Subject to section 6.3 of the Segregation Arrangements, a person seeking access is not provided with a fair response to a request under section 7 of the Code or a proposal”
- The words “Related Operator” are replaced with “Network Participant” in the second dot point of part 4.4 “Access Negotiation”
- The words “Network Participant” are replaced with “Operator” in the second dot point of Part 4.4 “Access Negotiation”
- Part 5 is removed

Appendix B – Confidentiality and Compliance Agreement

145. Appendix B – Confidentiality and Compliance Agreement – of BR’s proposed Segregation Arrangements is a deed in BR’s favour which provides that the person signatory to the deed must comply with the provisions of the Act in carrying out access-related functions.
146. Appendix B of the proposed Segregation Arrangements is in the same form as the equivalent part of the current Segregation Arrangements.
147. The Confidentiality and Compliance Agreement differs only in some form of words between the current and proposed Segregation Arrangements.
148. In its draft decision, the Authority required the following amendment to Appendix B of BR’s proposed Segregation Arrangements (Required Amendment 12):

The Appendix B of BR’s proposed Segregation Arrangements should be amended such that:

- *The words “but excludes information that” and Parts 2(c)(iv) to 2(c)(vii) are removed*

Comments in Submissions

149. Aurizon did not provide any comments in relation to Appendix B of BR’s proposed Segregation Arrangements.
150. BR indicated its acceptance of Required Amendment 12 as shown by suggested edits in the attachment to its submission. BR also suggested that an additional clause be added (Part 2(d) of Appendix B) worded “For the purposes of this deed, the term ‘access related functions’ has the meaning ascribed to that term in the Brookfield Rail Segregation Arrangements”.

Authority Assessment

151. The Authority confirms Required Amendment 12, as below.
152. The Authority does not agree that the additional clause suggested by BR at Part 2(d) of Appendix B is appropriate, as that clause makes a definition of “access related functions” which is inconsistent with the definition provided in the Act.

Required Amendment

Required Amendment 12

The Appendix B of BR’s proposed Segregation Arrangements should be amended such that:

- The words “but excludes information that” and Parts 2(c)(iv) to 2(c)(vii) are removed